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NEWS

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May 2022

Delaware Defines Damages in Deals Involving Cryptocurrency

By [Matt Albaugh](#), Taft Law

When cryptocurrency is the consideration to be paid on a contract and the contract is breached, how should a court calculate damages? That was the issue confronted by Judge Wallace in a case of first impression in [*Diamond Fortress Technologies, Inc. v. EverID, Inc.*, C.A. No. N21C-05-048 \(Del. Super. Ct. April 14, 2022\)](#).

The underlying case's facts are relatively simple. EverID sought to introduce a new cryptocurrency via an Initial Coin Offering (ICO). EverID contracted with Diamond Fortress Technologies to develop EverID's cryptocurrency trading platform and mobile application. The parties' contract called for EverID to pay coins in the newly issued cryptocurrency to Diamond Fortress Technologies. After services were rendered, EverID proceeded with its ICO and began distributing its new cryptocurrency.

Unfortunately, EverID failed to pay. Diamond Fortress sued in Delaware Superior Court. EverID never responded to the lawsuit or defended against Diamond Fortress' claims. [Note: The court never explained why EverID did not defend itself]. The court entered a default judgment for Diamond Fortress, finding EverID repudiated the

contract and was in total breach.

The court then held a damages hearing on "the appropriate methodology and value source for reckoning a damages judgment." The court recognized it was a case of first impression for "the classification and valuation of cryptocurrency" and "the calculation of damages resulting from the breach of a cryptocurrency-paid contract."

The court first grappled with the classification of cryptocurrencies. Are they a security, investment contract, a commodity, a property, or a currency? The Commodity Futures Trading Commission treats cryptocurrencies as commodities. The Securities and Exchange Commission defines cryptocurrencies to be securities. After analyzing current regulations, proposed new regulations, and the handful of decisions from across the country, the court concluded that "a cryptocurrency's characteristics at a given time best determine" their classification. At the ICO stage, cryptocurrencies are securities. Once the market matures, they become commodities. Because Diamond

Cont. on p. 4

Inside this issue:

Delaware Defines Damages in Deals Involving Cryptocurrency	1
Password Security	2
Well Being Week in Law	5
Book Club	5
CBA Bundle	6
Torts Resources	8

Hamilton County Law Library

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M-F 7am-4pm

Tech Tip: Password Security

by Julie Koehne, Systems Librarian

Interested in keeping your information safe? Find out what the industry is saying about password security.

From the Cybersecurity and Infrastructure Security Agency: The Cybersecurity and Infrastructure Security Agency reminds users of the importance of creating and managing strong passwords. Passwords are often the only barrier between you and your personal information. There are several programs attackers can use to help guess or "crack" passwords. However, choosing strong passwords and keeping them confidential can make it more difficult for others to access your information.

NCCIC/US-CERT recommends users take the following actions:

- Use multi-factor authentication when available.
- Use different passwords on different systems and accounts.
- Don't use passwords that are based on personal information that can be easily accessed or guessed.
- Use the longest password or passphrase permissible by each password system.
- Don't use words that can be found in any dictionary of any language.

Refer to Tips on [Choosing and Protecting Passwords](#) and [Supplementing Passwords](#) for best practices and additional information.

From Cybernews: Cybernews recommends these top ten password managers.

<https://us.cybernews.com/lp/best-password-managers-us>



1Password

<https://1password.com/>



LastPass

<https://www.lastpass.com/>



<https://www.zoho.com/>



RoboForm

<https://www.roboform.com/>



NordPass

<https://nordpass.com/>



Enpass

<https://www.enpass.io/>



Avira

<https://www.avira.com/>



DASHLANE

<https://www.dashlane.com/>



Remember Bear

<https://www.rememberbear.com/>



KEEPER

<https://www.keepersecurity.com/>

From Hive Systems: Hive Systems created the following infographic to visually see what types of password are stronger than others and how quickly then can be hacked.

<https://www.hivesystems.io/blog/are-your-passwords-in-the-green>



From Consumer Reports: Consumer Reports offers a quick look at the pros and cons of the latest two-factor authentication methods.

<https://www.consumerreports.org/digital-security/best-way-to-use-two-factor-authentication-a1070812070/>

From BrainStation: BrainStation indicates two-factor authentication (also known as two-factor auth or 2FA) is an additional security layer used to keep accounts secure and ensure that people can't gain access to online accounts that don't belong to them. Find out more about two-factor authentication. <https://brainstation.io/cybersecurity/two-factor-auth>

Fortress' services were directly linked to EverID's ICO, the court concluded that EverID's non-payment involved a security.

The court then moved onto the question of damages. As to the "valuation source" of cryptocurrencies, the court found that [CoinMarketCap](#) was the most reliable cryptocurrency valuation tool available to the court. It found the media's use of CoinMarketCap's valuations and Congress' identification of it as an "appropriate publicly available website" to be compelling. Next in the court's analysis was the amount of damages. Using the well-established securities framework, the court found Diamond Fortress' damages to be "the highest value within a reasonable time." Specifically, the court found the measure of damages was the higher of "(1) its value at the time of the conversion, or (2) its highest intermediate value between notice of the conversion and a reasonable time thereafter during which [the security] could have been replaced." Citing other securities cases, the court found that three months was a "reasonable period" to replace the cryptocurrency.

The highest value of EverID's cryptocurrency during that three-month period was \$2.01. The court multiplied by the 12,500,000 in coins Diamond Fortress was supposed to receive to arrive at its \$25,125,000 damages award. The court also tacked on pre-and post-judgment interest.

Key Takeaways:

- The court's distinction between "security" and "commodity" was vital. If the court deemed EverID coins a "commodity," the court likely would have concluded Diamond Fortress was entitled by contract to a delivery of the specific cryptocurrency. According to CoinMarketCap, EverID coins currently have a value of \$.016. That's the difference between receipt of coins worth \$2 million and a \$25,125,000 damages award.
- Parties wanting to receive cryptocurrency in exchange for services should go into a deal with eyes wide open. Absent a specific contractual provision stating other-

wise, if the work concerns an ICO or similar early-stage matter, damages will be calculated similarly to a withheld security. You'll get monetary damages calculated at the highest value within a reasonable time. If it's post-ICO and after the cryptocurrency's market is mature, damages will be in the form of "specific performance" and the non-breaching party will receive the contracted-for cryptocurrency.

- Cryptocurrency valuation can vary wildly from day to day, let alone month-to-month. In a single week in May 2021, Bitcoin lost 53% of its value, wiping out \$1 trillion in market capitalization. That begs the question of whether traditional valuation methodologies comparing publicly traded stocks with cryptocurrencies are fair or appropriate. As this nascent area of the law develops, it's worth monitoring whether securities concepts will continue to be applied to cryptocurrencies.

This case is a good example: If a contract or deal calls for payment in cryptocurrency, the parties should pay heightened attention to breach and damages provisions. Think through potential breach scenarios, and negotiate how damages will be calculated in the event of such a breach. Be precise in how contractual damages are calculated. If the parties have not specifically agreed on methodologies, the courts will fall back on well-worn damages principles that may or may not be appropriate.

Taft/

Matt Albaugh's regulatory and compliance experience is extensive. He has represented clients in administrative actions brought by state and federal regulators, including the U.S. Department of Justice, IRS, SEC, state Attorney General's offices, state insurance commissioners, and state Securities Divisions. He also litigates complex constitutional law matters in trial and appellate courts and has handled appeals in numerous state and federal appellate courts, including the U.S. Supreme Court.

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Well-Being Week in Law

Well-Being Week in Law is May 2-6 this year. According to the Institute for Well-Being in Law (WWIL):

"The aim of WWIL is to raise awareness about mental health and encourage action and innovation across the profession to improve well-being."

We will be sharing daily info and resources to help inform and contribute to well-being in law throughout the week. Stay tuned to our social media channels for more information!



MAY 2-6, 2022

Book Club

The Hamilton County Law Library Book Club is very excited to be partnering with the CBA starting with our next meeting on:

Friday, May 6, 2022, 12:00 via Zoom.

This month's selection is *The Midnight Library*, by Matt Haig. If you ever wondered about the multiverse of life choices, this is the book for you.

We will also be working with the Cincinnati and Hamilton County Public Library to provide print copies for our book club attendees.

We are very excited to be able to bring you this opportunity.

And, we look forward to seeing you on the 6th!

Sign up [here](#).

Conference Rooms

Our conference rooms provide versatile options for our subscribers to do work in a quiet setting in the courthouse. Equipped with large monitors and technology for remote court hearings or meetings via Zoom and other methods, the rooms allow subscribers to conduct their business from the comfort of the Law Library. Subscribers can reserve the rooms and use the tech for these purposes, and can also conduct in-person client meetings, make phone calls, do legal research or just take a moment between hearings.

In addition to the smaller conference rooms, subscribers can also reserve the boardroom for larger meetings, hearings and other videoconferences. That room is configurable in multiple ways. If you let us know how you'd like it set up and what your tech needs are when you reserve it, we'll have it arranged and ready for your arrival!

Our [website](#) features descriptions of the available resources and capacities of each room, so feel free to peruse to determine which space best suits your needs. Note that even rooms that don't have a hard-wired computer connection can be made more tech-friendly by borrowing one of the Law Library's new laptops, available for in-library use.

Reserve the rooms via our [website](#) 24/7 or call 946-5300 during business hours for us to assist or with questions. Walk-ins are welcome, but priority will be given to reservations.



Subscriber Benefits

All subscribers have access to the following valuable resources and services:

Circulation privileges to borrow from over 40,000 print volumes for up to six weeks at a time

Access to extensive legal information databases from the Law Library, including Lexis+, Westlaw, Wolters Kluwer VitalLaw™, Overdrive e-books, HeinOnline, and Loislaw treatises

Wireless network throughout the Law Library

Polycom videoconferencing

Eight meeting rooms with speaker phones

Professional reference service by our law librarians, available via e-mail, telephone, and in person

Free document delivery by fax or e-mail of print and electronic materials

CLE seminars throughout the year on legal research and substantive topics

Subscribers' lounge, magazines, daily newspapers, and coffee

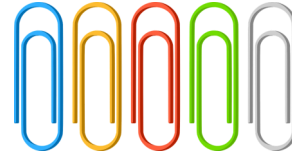
Bi-weekly news alerts by practice area

Discounted rates for photocopying

In addition, solos and attorneys whose firm has a subscription have 24 hour remote access to Fastcase.com case law, Aspen/LOISLaw treatises, HeinOnline (for under 50 attorney firms), EBSCOhost, and Wolters Kluwer VitalLaw™

CBA Bundle Renewals

A reminder for our subscribers who have bundled their Law Library subscription with their Cincinnati Bar Association membership – please make sure to select the Law Library add-on when you submit your 2022-2023 Membership Renewal to the CBA. Already renewed with the CBA and didn't add it on? It's not too late! Please contact Lauren by email at lmorrison@cms.hamilton-co.org and she'll work with you to make sure it gets processed.



Upcoming CLEs—Live Interactive Webinars

Thursday, June 30, 2022, 12-1 PM

Introduction to Elder Law Hot Topics.

Presenters: Kathryn E. Buerger, Esq., William Hesch Law Firm, LLC

Amy L. Kurlansky, Esq., Hamilton County Law Library

1.0 general credit applied in OH and KY

CLEs on Demand

The Hamilton County Law Library is proud to announce the following self study CLEs to in our on-demand library for the year 2022:

The Law of Boxing (1.0 hour in OH, and 1.0 hour in KY until June 30, 2022)

Implicit Bias & the Criminal Justice System (1.0 hour Professional Conduct in OH)

Elder Financial Exploitation & Undue Influence (1.0 general hour in OH)

Hamilton County Municipal Court Update (1.0 general hour in OH)

Please keep a look out for more self-study videos that are returning or coming to the on-demand library in the near future.

Torts Resources

Law Library subscribers have access to a variety of Torts Resources, including those listed below. If you have questions about these resources, contact the reference staff at reference@cms.hamilton-co.org or 513.946.5300.

Business torts: a practical guide to litigation
KF1250 .B845 2014

Business torts and unfair competition handbook
KF3195 .B88 2014

Business torts journal
K2 .U789 [internet]

Consumer warranty law
KF8995 .L68

Damages in personal injury [in Ohio]
KFO195.A25 D36 2014

Damages in tort actions
KF1250 .D35

Hornbook on torts [Dobbs]
KF1250 .D59 2016

Jury instructions on damages in tort actions
KF8984 .E23 2012

The law of premises liability
KF1287 .P33 2011

The law of torts
KF1250 .D60 2011

Negligence & compensation cases annotated
KF1280.A2 N4

Restatement of the law, second: torts 2d
KF395 .A2 T671

Online Resources

EBSCO

Mass Torts

HeinOnline

Restatement in the Courts

Toxic Torts and Mass Torts, SMU Law Review (multiple years)

Lexis +

Anderson's Ohio Personal Injury Litigation Manual

Environmental Litigation and Toxic Torts Committee Newsletter

Personal Injury: Actions, Defenses, Damages

Overdrive

Law of Commercial Trucking: Damages to Person and Property

Principals of Tort Law

Principles of Remedies

Fastcase/Lois Law Library

General Litigation Library

Personal Injury Law Library

Product Liability Law Library

Remedies Law Library

Westlaw

Baldwin's Ohio Practice, Ohio Tort Law

Comparative Negligence Manual

Stein on Personal Injury Damages

Upcoming Events:

Well Being Week in Law, May 2-6, 2022

Friday, May 6, 2022, 12-1 via Zoom, HCLL Book Club meeting

Monday, May 30, 2022, Memorial Day, Library closed

Thursday, June 30, 2022, 12-1 CLE Introduction to Elder Law Hot Topics, on Zoom



May 2022 Law Library Newsletter

INSIDE THIS MONTH

- Tech tip: Password Security
- Well Being Week in law
- Torts Resources

ADDRESS CORRECTION REQUESTED

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